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HAGUE INSTITUTE FOR THE INTERNATIONALISATION OF LAW

# Rule of Law Inventory Report



# Rule of Law Inventory Report

## Academic Part

By

HiiL

Discussion Paper for the High Level Expert Meeting on the Rule of  
Law of 20<sup>th</sup> April 2007



## **Inventory Report, Academic Part (HiiL) and Practice Part (IDLO)**

### *A note on the background*

On Tuesday 25<sup>th</sup> April 2006, the Hague Institute for the Internationalisation of Law (HiiL) convened a High Level Expert Panel on the Rule of Law at the Netherlands Institute for Advanced Study in the Humanities and Social Sciences (NIAS) in Wassenaar, The Netherlands. The principal objective of the meeting was to explore where HiiL, given its research programme (see [www.hiil.org](http://www.hiil.org)), could most effectively contribute to the current debate on the rule of law. The meeting brought together a unique group of experts for the first time, consisting of representatives from both practice and academia with backgrounds in law and/or social sciences, who worked for institutions involved with the rule of law on a worldwide, regional and/or local level.

The discussions resulted in two main conclusions. First, both practitioners and academics felt a need for more and closer networking with a view towards achieving a more effective understanding and coordination. HiiL was requested to take on the task of acting as a convenor of the network and it agreed to do so. Secondly, it was agreed that a knowledge gathering exercise to map out the lay of the land insofar as it related to the rule of law. HiiL and the International Law and Development Organisation (IDLO) offered to coordinate this effort. It was decided that the knowledge gathering would result in an Inventory Report, which was to consist of two parts: (a) an Academic Part, aimed at providing an overview and summary analysis of paradigms and knowledge acquired in the past decades through academic research; and (b) a Practice Part, aimed at providing an overview of the practice manuals, evaluations, indexes, databases of the most relevant institutions working on the rule of law.

This Inventory Report is the first step in this knowledge gathering exercise and should be assessed in relation to the IDLO Rule of Law Database, which was prepared as part of the same knowledge gathering exercise.

The 2006 Wassenaar Panel Meeting established a basic framework for the Academic Part of the Inventory Report. The general point of departure is that there is no uniform conception of the rule of law: it is used to define a number of concepts, it is tied to a variety of aims and it operates at different levels. The objectives of the Academic Part are to clarify the debate, to provide an overview of the most relevant academic research and thought and, based on that, to draw some general conclusions which may be helpful to further the debate. In doing so, the focus principally lies on rule of law at the national level.

The preparation of the Academic Part of the Rule of Law Inventory Report was funded by HiiL and prepared by a small team of HiiL researchers: Dr. Ronald Janse (Senior Lecturer at Utrecht University), Dr. Maria Dolores Sanchez Galera (Research Fellow Candidate for Centro de Estudios Politicos y Constitucionales, Madrid) and Mr. Rain Liivoja (Research Fellow and PhD candidate at Helsinki University). The group worked under the overall supervision of a Steering Committee composed of Dr. Sam Muller (HiiL Director), Prof. Michiel Scheltema (Chairman of HiiL Programmatic Steering Board), Prof. Brian Tamanaha (University of St. John's, New York), Prof. Jan-Michiel Otto (Van Vollenhoven Institute, University of Leiden), Prof. André Nollkaemper (University of Amsterdam) and Ms. Anabela Atanásio Alves (HiiL Senior Policy Officer and Project Manager).

This version of the academic part formed the basis for discussion at the next High Level Panel meeting of the network on 20 April, 2007. The report was finalized on the basis of the discussions which took place.

Sam Muller and Ronald Janse  
2 April 2007

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## I. THE RULE OF LAW INVENTORY REPORT

### A. Academic Part

#### 1. Introduction

On 18 December 2006, the UN General Assembly adopted a resolution on 'the rule of law at the international and national levels'<sup>1</sup> The resolution noted that many organs, departments, bodies, offices, funds and programmes within the UN system are currently devoted to the promotion of the rule of law at international and national levels. It requested the Secretary-General to prepare an inventory of all the activities, as well as a report on how to strengthen and coordinate them. It also urged him to speed up the establishment of a special rule of law coordination and assistance unit, an idea that had originally been proposed by the Secretary-General in his 2005 report<sup>2</sup> and that had subsequently been endorsed in the 2005 World Summit Outcome document.<sup>3</sup> At approximately the same time, on 14 December 2006 to be precise, the Secretary-General issued his report titled *Uniting our strengths: Enhancing UN support for the rule of law*<sup>4</sup> in which he announced his decision to establish a Rule of Law Coordination and Resource Group within the secretariat, which will be supported by a small unit. This group will be the focal point for coordinating rule of law promotion at headquarters and in the field and will act as a repository of rule of law materials, resources, and best practices. Clearly, by adopting the resolution the General Assembly has made the rule of law one of its priorities and according to the aforementioned report the Secretariat sees a coordinating role for itself in this regard.

The UN is hardly unique in this. Over the past two decades, many international organisations, states, non-governmental organisations, lawyers and judges associations, policy think-tanks, and private foundations have been engaged in promoting the rule of law on the national level.<sup>5</sup> The Council of Europe, the Open Society Institute, the World Bank, the South African Development Community, the Commonwealth, the Canadian International Development Agency, the German Agency for Technical Cooperation, the United States Agency for International Development, the International Bar Association, the American Bar Association; these are just a few of the many major actors involved in rule of law promotion<sup>6</sup>.

The activities of these organisations are not confined to a specific region, or to a particular political or socio-economic context. Rule of law promotion started in the mid-1980's in Latin America and quickly spread to many other regions, including Eastern European states and Russia after the fall of Communism; the Balkan states after the civil wars in former Yugoslavia; China and other states in the Far East; sub-Saharan Africa; Kosovo, Rwanda, East-Timor, Afghanistan and other so-called post-conflict societies. Except for Western Europe, North America, Japan, Australia and New Zealand, almost all states are or have been the subject of efforts by outsiders to establish or strengthen the rule of law.

No less impressive than the geography of the rule of law movement is the variety of activities that are carried out under its umbrella. The training of judges, lawyers and other legal personnel; the building of prisons and courthouses; the establishment of management and administration systems for judiciaries; the establishment or strengthening of bar associations and law schools; the drafting of new laws, regulations, and entire codes of criminal or civil procedure; encouraging states to ratify international treaties, especially in the area of human

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<sup>1</sup> UNGA A/RES/61/39, 18 December 2006.

<sup>2</sup> *In larger freedom: Towards development, security and human rights for all*, A/59/2005, para. 137.

<sup>3</sup> Resolution 60/1, para. 134 (e).

<sup>4</sup> A/61/636-S/2006/980, 14 December 2006.

<sup>5</sup> The rule of law on the level of international law and international affairs, falls outside the scope of the present inquiry. For analyses of this issue, see, among others, J. Crawford, 'International law and the rule of law', in: 24 *Adelaide Law Review*, 3, 2003, 3; Sir Arthur Watts, 'The International Rule of Law', in: 36 *German Yearbook of International Law*, 1992, 5; R. Higgins, 'The ICJ, the United Nations System, and the Rule of Law', Speech at the London School of Economics, 13 November 2006, available at

[http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113\\_Higgins.pdf](http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf)

<sup>6</sup> The Inventory Report, Practice Part: The IDLO Rule of Law Portal, mentions more than 500 actors involved in rule of law promotion.

rights; training of the police force; new policies in the fight against international terrorism and against transnational money-laundering, drug-trafficking and human-trafficking; facilitating consultation debate so as to ensure the involvement of all sectors of society in law-making and policy decisions; assisting in public information campaigns; producing training materials for primary and secondary schoolteachers, journalists, and national and local NGO's; providing electoral assistance; providing adjustment loans, investment loans, and learning and innovation loans to citizens and companies; the establishment of small claims courts, public interest litigation, legal aid schemes and informal justice systems – this and much else is happening in the mushrooming world of rule of law promotion.

It is, finally, noteworthy how many values are said to be served by all these rule of law promotion efforts. To name just a few of the most well known: human rights observance, economic development, the fight against terrorism, the creation of open societies, certainty and predictability in relations among citizens and between citizens and government.

So what is this one-size-fits-all solution to many of the world's troubles? What, exactly, is this rule of law that is being promoted? What is the point of the rule of law, why is it worth having? Which conditions have to be met for the rule of law to be successfully implemented? Which means are available to promote the rule of law? How effective is rule of law promotion in achieving the ends it is supposed to achieve? One would perhaps expect that the actors involved could give clear answers to these questions because it seems unlikely that they would otherwise have embarked on a journey which has already cost billions of euros and which is likely to have a deep impact on the recipient states, whether or not it has the effects that were intended. Very few clear answers seem to exist however, and to the extent that actors have clear answers there are often equally clear but entirely different answers by other actors.<sup>7</sup> The new rule of law orthodoxy therefore seems to rest on many different foundations, making the overall structure a shaky one.

The aim of this inventory is to shed some light on the practice of rule of law promotion by looking at what has been written about the rule of law and rule of law promotion in academia. It subsequently makes an attempt to find common ground in the plethora of views by distilling a common frame of reference. Hereafter, and based on the common frame of reference, it proceeds to discuss what is known and not known in academic literature about the conditions of rule of law promotion and then touches upon one of the means of rule of law promotion. Finally, some remarks are made about rule of law promotion efforts by some prominent organisations with a view to assessing the usefulness and the obstacles of the common frame of reference of the rule of law. On the basis of this, the report will formulate conclusions and recommendations.

It would be odd to conclude this introductory section without paying attention to the relation between this paper and the fine Carnegie paper by Rachel Kleinfeld Belton<sup>8</sup>, mentioned above, for this paper also aims to bring conceptual clarity in the field of rule of law promotion and to be of help to practitioners. So what are the main similarities and differences between these papers?

Kleinfeld Belton's paper, like this one, proceeds from the observation that actors involved in rule of law promotion, either implicitly or explicitly, have very different understandings of what the rule of law is about. Moreover, she convincingly shows that many actors seem to identify the rule of law with a particular set of institutions, namely, a judiciary which is properly trained, settles disputes in court houses, and so on; rather than with the values which these institutions are supposed to serve. This leads to a certain blindness for the possibility that these values might also, or perhaps better, be served by other institutions or mechanisms and for the fact that rule of law promotion may, or rather, is likely to involve, efforts across various institutions. To remedy this situation, Kleinfeld Belton usefully distinguishes between what she calls end-

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<sup>7</sup> This is strongly emphasized in all recent work on rule of law promotion. See especially: T. Carothers, *Promoting the rule of law abroad; In search of knowledge*, Washington D.C., 2006; R. Kleinfeld Belton, *Competing definitions of the rule of law; Implications for practitioners*, Washington D.C., 2005; K. Samuels, *Rule of law reform in post-conflict societies; Operational initiatives and lessons learnt*, Washington D.C., 2006; J. Stromseth, D. Wippman and R. Brooks, *Can might make rights? Building the rule of law after military interventions*, Cambridge, 2006.

<sup>8</sup> See supra 7, which was published just two years ago (nr. 55, January 2005, reprinted in: T. Carothers (ed.), *supra* note 7, at pp 31-74).

based definitions of the rule of law and institution-based definitions. She lists and discusses five such value-oriented definitions and argues that these values are independent of each other and can be in conflict with one another.<sup>9</sup> Kleinfeld Belton advocates using end-based definitions over institution-based definitions and demonstrates that the use of such definitions leads to some important guiding principles on how to promote the rule of law.<sup>10</sup>

This paper follows Kleinfeld Belton in thinking that institution-based definitions are of limited use and that institutions should not figure prominently in the concept of the rule of law. It differs from her analysis however in assuming that there are two relevant levels of analysis with regard to the concept of the rule of law, the meaning of the rule of law and the values which it serves. This paper will focus on both the values and the meaning of the rule of law. Secondly and more importantly, this paper distils from the multitude of academic writings a particular understanding of the rule of law (the aforementioned common frame of reference) and develops this as a possible starting point for rule of law promotion. Thus the report builds further the analytical framework that was presented by Professor Brian Tamanaha and elaborately discussed at the 2006 meeting.

## **2. Complexities and divergences**

Academics who study rule of law promotion argue that much confusion over the meaning, aims, means and successes of rule of law promotion is currently prevalent among politicians, diplomats, and other practitioners. One would, of course, hope that academics themselves have a much clearer understanding of the issue. In fact, even a quick glance at recent academic writing is sufficient to conclude that academia, if anything, is as much divided over the meaning and aims of the rule of law as practice. Like 'art' and 'democracy', the rule of law is a concept which is complex and controversial on many counts.

One of these complexities concerns the relation between the notion of 'rule of law' as used in the common law tradition and the notion of 'Rechtsstaat (literally: 'constitutional state') as used in civil law traditions. Although the 'rule of law' is generally considered the most adequate translation of the German Rechtsstaat or the French État de droit, it is often pointed out that the continental understanding of the term Rechtsstaat differs to some extent from the Anglo-American term rule of law. A possible source of confusion which, incidentally, is exacerbated by the fact that English and American understandings of the term rule of law also seem to be different to some extent.<sup>11</sup> As way of example which is relevant for rule of law promotion, one may note that on the continent, it seems natural to think of the Rechtsstaat as an ideal which is exclusively about limiting the power of the state, whereas in the Anglo-American understanding of the term the rule of law also applies to the relations among citizens. In other words, the term Rechtsstaat refers to the vertical relation between the state or government and the citizens whereas the rule of law also encompasses the horizontal relation among citizens.

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<sup>9</sup> The ends or values are: (1) a government bound by law; (2) equality before the law; (3) law and order; (4) predictable and efficient rulings; (5) human rights. It is not immediately obvious how the first item can be described as an end. Government bound by law rather seems to be (part of) the *meaning* of the term rule of law, whereas the prevention, or hindering, of abuse of power is the *end*. The same is true of the fifth item, but the end in this case is obviously respect for human rights, or, more generally, for human dignity.

<sup>10</sup> She summarizes as follows: (1) for any rule-of-law end, all institutions must be reformed; (2) achieving rule-of-law ends requires political and cultural, not only institutional, change; (3) not all work to reform legal institutions is rule-of-law reform; (4) rule-of-law ends are in tension, particularly in poor societies or societies with a weak rule of law. Improvements in one end goal can decrease success in others; we should measure the ends of the rule of law, not the institutions. Given the tension between goods, we will gain clarity if instead of measuring the rule of law, we measure achievement in each end of the rule of law. See Kleinfeld Belton at pp 21-28.

<sup>11</sup> N.W. Barber, 'The Rechtsstaat and the Rule of Law', in: 53 *University of Toronto Law Review*, 2003, 443-454; M. Rosenfeld, 'Rule of Law versus Rechtsstaat', in: P. Häberle and J.P. Müller, eds. *Menschenrechte und Bürgerrechte in einer vielgestaltigen Welt*, Basel, 2000; R. Grote, 'Rule of law, Rechtsstaat, and Etat de Droit', in: C. Starck (ed.), *Constitutionalism, Universalism and Democracy – a comparative analysis*, Baden-Baden, 1999, 270-306. Please also see the seminal work by Mirjan R. Damaska, *The Faces of Justice and State Authority*, Yale University Press, September 1991. Damaska's work provides a trans-systematic approach based on institutional factors (e.g. lay versus professional judges, hierarchical versus stratified court systems) rather than the mere source-of-law debate.

Another complexity usually remains largely implicit in academic writings on the rule of law. Most academic work on the rule of law is written by experts in a particular field of law on the national level, say, by professors in Dutch criminal procedure. These experts often confidently explain how many specific legal arrangements or rules guarantee the rule of law or they express concern over how a change in the existing rules might seriously undermine the rule of law. This leaves the reader with the impression that the rule of law requires a very specific set of rules, arrangements and institutions and that even the slightest changes in these rules would be a catastrophe for the future of the rule of law. Yet when the same reader consults a textbook by a British professor in criminal procedure he will be confronted with an equally eloquent explanation of how different rules, arrangements and institutions guarantee the rule of law in Britain, and of how a change in these rules would seriously weaken the century-old British commitment to the rule of law.

In short, the rule of law is compatible with widely different legal arrangements, systems and rules. 'There is...no single model'.<sup>12</sup> To give just a few of the most general examples, the rule of law requires, according to many, that judges are independent, but in The Netherlands judges are appointed for life, whereas they are elected in many states in the United States of America. The rule of law implies, many would agree, that everyone has a right to a fair trial, but this trial can be organised around the principles of the inquisitorial system or of the adversarial system or of a mixture of both. And decisions over issues of fact can be trusted to judges, but also to juries.

So the rule of law exists on different levels, from the abstract to the specific, and on the level of more specific rules and principles, there is range of possibilities, both geographically and historically, which all are or at least can be compatible with the rule of law. It is especially important to keep this in mind when one looks at rule of law promotion efforts since donor organisations and states have often proceeded from the assumption that the only way to create or strengthen the rule of law is to replicate the legal system of donor states.<sup>13</sup> The effects of such legal transplants, for instance trial by jury, have however, been mixed and in current scholarship it is often emphasized that rule of law promotion is often more likely to be successful if the rule of law is built on the foundations of available legal arrangements in the recipient country rather than on bits and pieces imported from abroad.<sup>14</sup>

The variety on the level of more specific rules and arrangements would perhaps be manageable if there were consensus among scholars over the meaning of the rule of law on an abstract level. If present, such an understanding could work as an anchor for more detailed arrangements. No such consensus exists however; in fact, not even remotely. There are very different views on what the main characteristic features and the value of the rule of law are.

On the one hand there are those who argue that the objective of the rule of law consists of enabling human flourishing in the most expansive sense of the word. The famous formulation of this conception of the rule of law is by the International Commission of Jurists which in its 1959 Conference in New Delhi explained that:

[the] '...function of the legislature in a free society under the Rule of Law is to create and maintain the conditions which will uphold the dignity of man as an individual. This dignity requires not only the recognition of his civil and political rights but also the establishment of the social, economic, educational and cultural conditions which are essential to the full development of his personality'<sup>15</sup>.

There are few, if any, scholars who have defended an equally broad concept of the rule of law but there are versions that come close. Dworkin, for example, one of the most influential legal

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<sup>12</sup> P. Selznick, 'Legal cultures and the rule of law', in: M. Krygier and A. Czarnota, *The rule of law after communism: Problems and prospects in East-Central Europe*, Aldershot, 1999, 21-28, at 22.

<sup>13</sup> S. Holmes, 'Can foreign aid promote the rule of law?', in: *East European Constitutional Review*, vol 8, nr. 4, 1999.

<sup>14</sup> For debate on legal transplants, see P. Legrand, 'The impossibility of legal transplants', in: 4 *Maastricht Journal of European and Comparative Law*, 1997, 111-124 and A. Watson, *Legal Transplants*, Athens (Georgia), 1993).

<sup>15</sup> See J. Raz, 'The rule of law and its virtue', in: Raz, *The authority of law; Essays on law and morality*, Oxford, 1979, 210-232, at 210-1.

philosophers of the past century, defines his 'rights' conception of the rule of law in the following manner:

'It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law in this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish...between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the book capture and enforce moral rights'<sup>16</sup>.

There are also scholars who defend a more modest conception of the rule of law. According to them, the point of the rule of law lies primarily in limiting the exercise of governmental power and in making the actions of the government with respect to its citizens and of citizens with respect to each other predictable. Hayek, for example, writes that the rule of law:

'...means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge'<sup>17</sup>.

Raz's conception of the rule of law is roughly similar:

'The rule of law means literally what it says: the rule of laws. Taken in its broadest sense this means that people should obey the law and be ruled by it'<sup>18</sup>.

Our review of the literature has shown that the two conceptions of the rule of law just mentioned represent the two opposite sides of contestation about the proper meaning and aims of the rule of law. These opposite sides are variously described in scholarly literature as broad versus narrow, thick versus thin, substantive versus formal.<sup>19</sup> The key difference is that the narrow or thin or formal conceptions deny that the existence of the rule of law depends on the content of the laws which rule. To put it in extreme terms: if one wants to find out whether the rule of law existed in South-Africa prior to 1990, the fact that Apartheid was firmly entrenched in legislation and case-law is irrelevant; what is relevant, among other things, is whether these laws were sufficiently clear, so that they could guide the conduct of persons, so as to enable them to plan their lives. It is very important that this example, which is deliberately extreme so as to avoid equivocation, is not misunderstood. First, the cases of highly abject regimes which comply with the rule of law are very rare indeed. Secondly, those who defend a thin conception of the rule of law do not refuse to pass judgment on the content of laws. They may have strong views on what the content of the law should be and they may be highly active and energetic in trying to reform the law if it is less just than it should be. What the example highlights is that some thinkers make an analytical distinction between the existence of the rule of law and the content of the laws that rule. In these models, substantive justice is an independent ideal which in its core is different from the ideal of the rule of law. In short, the rule of law may not by definition be the rule of good law, though it preferably is.<sup>20</sup>

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<sup>16</sup> R. Dworkin, *A matter of principle*, Cambridge: Mass., 1985, at 11-12.

<sup>17</sup> F. A. Hayek, *The road to serfdom*, London, 1993, at 54.

<sup>18</sup> Supra note 15, at p 212.

<sup>19</sup> The distinction between thin and thick is by far the most common in academic literature, but other classifications are possible. Fallon, for example, distinguishes between historicist, formalist, legal process and substantive conceptions of the rule of law (Fallon: 5).

<sup>20</sup> Raz at p 211. For those familiar with legal theory, it will not come as a surprise that those who defend the thin conception of the rule of law are often outspoken exponents of legal positivism. See P.P. Graig, 'Formal and substantive conceptions of the rule of law: An analytical framework', in: *Public Law*, 1997, 467-87, at 477. For a classic explanation of the meaning and merits of legal positivism, see H.L.A. Hart, 'Positivism and the separation of law and morals', in: *Essays in jurisprudence and philosophy*, Oxford, 1993, 49-87.

The foregoing may give the impression that there are only two versions of the rule of law: a thin and a thick one. In fact, thick and thin should rather be seen as broad categories, within which further distinctions can be made. There is a broad spectrum of rule of law conceptions, ranging from thinnest to thin and from thick to thickest. This has been presented very clearly by Tamanaha in his table of rule of law conceptions.<sup>21</sup>

| <b>ALTERNATIVE RULE OF LAW FORMULATIONS</b> |                                          |                                            |                                                            |
|---------------------------------------------|------------------------------------------|--------------------------------------------|------------------------------------------------------------|
|                                             | Thinner -----> to -----> Thicker         |                                            |                                                            |
| <b>FORMAL VERSIONS:</b>                     | <b>1. Rule-by-Law</b>                    | <b>2. Formal Legality</b>                  | <b>3. Democracy+ Legality</b>                              |
|                                             | – law as instrument of government action | – general, prospective, clear, certain     | – consent determines content of law                        |
| <b>SUBSTANTIVE VERSIONS:</b>                | <b>4. Individual Rights</b>              | <b>5. Right of Dignity and /or Justice</b> | <b>6. Social Welfare</b>                                   |
|                                             | – property, contract, privacy, autonomy  |                                            | – substantive equality, welfare, preservation of community |

Whether the thin conception of the rule of law is superior to the thick conception and which of the thin or thick conceptions is best is an issue which is impossible to resolve. There are good reasons for and against any of the conceptions, but no argument is available which demonstrates beyond doubt to all reasonable participants to the debate that one conception is clearly the best. Some commentators have therefore suggested that the rule of law, like 'art' and 'democracy', is an example of what the British philosopher W.B. Gallie half a century ago called essentially contested concepts, that is, 'concepts the proper use of which inevitably involves endless disputes about their proper uses on the part of their users'.<sup>22</sup>

### **3. Conceptual Starting Point: Formulating a Base-line**

This wide divergence in scholarly thinking combined with the huge diversity of practice laid bare by the Practical Part of this Inventory Report make it necessary to formulate basic parameters which can, at the very least, avoid Babelonean confusion at the outset and which can form a starting point for a conversation among those studying rule of law promotion. With Tamanaha at the previous Panel meeting this report builds on the thinner conceptions of the rule of law as a base line for further discussion and analysis. What this conception amounts to precisely, will be discussed in the next section. Suffice it to say at this point that it analytically (and only analytically!) excludes in the first steps of the analysis two elements which some consider vital ingredients of the rule of law. First, the thinner conception does not demand that the law which is to rule is entirely in conformity with human rights standards. According to this line of reasoning, analytically speaking, the rule of law can exist in a state where some civil, political,

<sup>21</sup> B. Z. Tamanaha, *On the Rule of Law; History, Politics, Theory*, Cambridge, 2006, at 91.

<sup>22</sup> R. J. Fallon, 'The rule of law as a concept in constitutional discourse', in: *Columbia Law Review*, vol. 97, 1997, nr 1, 1-56, at 7; J. Waldron, 'Is the rule of law an essentially contested concept (in Florida)?', in: *Law and Philosophy*, 21, 137-64, 2002, at 148-159; W.B. Gallie, 'Essentially contested concepts', in: *Proceedings of the Aristotelian Society*, vol. LVI, 1955-6, 1956, 167-198, at 169. This does not just mean that the concept of the rule of law is vigorously contested, with no resolution in sight. It means that the contestation goes to the very core of the concept (Waldron: 149). There are perfectly coherent and defensible, but profoundly different views on the content and requirements of the concept, as well as on why it is to be valued, on the point that it has. This does not discharge one from attempting to outline a version of the concept that is coherent, convincing and possibly useful. Indeed, the contestation surrounding the use of essentially contested concepts challenges the users of these concepts to sharpen their own conception. 'Recognition of a given concept as essentially contested implies recognition of rival uses of it (such as oneself repudiates) as not only logically possible and humanly 'likely', but as of permanent critical value to one's own use or interpretation of the concept in question...' (Gallie: 193). But any conception can and will on good grounds be contested, and the conception outlined in this report is no exception.

economic, social or cultural rights are not respected.<sup>23</sup> Secondly, the conception does not require that the laws that rule have either, directly or indirectly, been made by citizens. Again, analytically speaking, an undemocratic political system can in this conception, have the rule of law. The analytical base-line conception outlined here is silent on who governs and is compatible with the classic forms of government: a monarchy, an aristocracy and a democracy. It is a standard regarding how governmental power, whether democratic or undemocratic, is to be exercised.

This does not mean that no assessment is made or judgement is passed concerning the question whether a state should be democratic and/or observe basic human rights standards. All that is said is that, analytically speaking and in order to provide a common base-line from which to start a useful conversation on the rule of law, these questions are not examined in the first instance.

One value of the thinner conceptions of the rule of law is the fact that they form the lowest common denominator of the wide diversity of rule of law conceptions. And an examination of scholarly literature and practice has shown that this is badly needed. Whatever else one would or would not like to see in a conception of the rule of law, there is agreement that it at least involves the elements of the thin conception. Consequently, the thin conception is the most promising avenue if one wants to find conceptual common ground to start a conversation among those studying rule of law promotion. A road-building project is unlikely to succeed if constructors, planners, governmental agencies and the like do not agree on the definition of a highway. The rule of law is not different from a highway in this respect.<sup>24</sup>

Proponents of the thinner conceptions have also argued that such an approach is less 'evangelical' in the sense that it prescribes less. By being neutral with regard to the form of government and to different substantive visions or ideologies,<sup>25</sup> thinner conceptions can have a higher value as a basis from which to start a consensus building conversation than conceptions which are composed of various substantive elements.<sup>26</sup> Following this line of reasoning, one could argue that communicating about and working on the rule of law, even if thinly conceived is important: the thin conception serves the values of legal certainty, formal equality and the prevention of an arbitrary use of power, and although these are certainly not the only values which we would like to see upheld by and through law, they could be seen as values are worth protecting in and of themselves. In the words of one of the scholars of rule of law promotion:

'...exports [of the thin conception] have reasonable chances of success in all countries, but attempts to export a particular form of the rule of law reflecting specific political or economic values that are not part of the core values of the rule of law and that are in fact rejected by the target country may be viewed at best as misguided and at worst as imperialistic'.<sup>27</sup>

Using the thinner conceptions of the rule of law as a first analytical step can assist in creating more conceptual clarity. If the rule of law is taken to encompass the necessity of a democratic form of government and of the protection of human rights or of a particular political ideology, the concept can cease to have an independent meaning. The concept of the rule of law then becomes synonymous with the ideal of a just society (in effect, the International Commission of

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<sup>23</sup> A caveat is appropriate at this point. As will be shown later, the thin conception outlined here cannot exist without some degree of free speech and some degree of legal aid –unless, of course, one prefers the rule of law to be just a piece of paper, which does not have a counterpart in reality. These requirements will later be presented as preconditions of the thin conception, rather than as elements of the thin conception itself, so they remain distinct from an analytical point of view. In practice, however, the thin conception cannot operate without these requirements. Some human rights, whether formally acknowledged or not, thus seem indispensable.

<sup>24</sup> Analogy borrowed from Holmes, p 5.

<sup>25</sup> R.S. Summers, 'The principles of the rule of law', in: 74 *Notre Dame Law Review*, 5, 1999, 1691-1712, at 1709-10.

<sup>26</sup> Needless to say, the thin conception outlined here is formal, not substantive. It should be noted, however, that the thin conception outlined here also excludes a formal element that is sometimes included in rule of law conceptions. This element is democracy, formally conceived of as a decision-making procedure in which political decisions are made directly or indirectly by citizens.

<sup>27</sup> J. C. Reitz, 'Export of the rule of law', in: 13 *Transnational Law and Contemporary Problems*, 2003, 429-486, at 435.

Jurists definition provided in paragraph 16, above). The consequence is that the rule of law becomes a very complex notion, hard to use, analyse, assess, evaluate, and promote. The lack of clarity is deepened by the fact that 'thickening' notions such as democracy and human rights are, conceptually, essentially contested concepts in their own right. To raise just a few questions: Is a decision democratic if it has been brought about in a certain way, i.e. if it has been made, indirectly, by the majority of citizens; or is it democratic if it has a certain result, i.e. if the interests of all citizens, even, or rather especially, if they constitute a minority, are respected, at least to some extent? In other words, do we adopt a formal or a substantive, a thin or a thick, a narrow or a broad conception of democracy? And what about human rights? Do we, for instance, consider the protection of civil and political rights as essential to the meaning of the rule of law, or do we hold, with the International Commission of Jurists convening in New Delhi, that social, economic and cultural rights should also be protected? Is it acceptable, according to the standard of the rule of law, when a state decides to give priority to the protection of economic rights, to the detriment of civil and political rights?<sup>28</sup>

A fourth argument which has been advanced in favour of thinner conceptions of the rule of law is related to the third: the thinner conceptions of the rule of law are of more practical use. According to this line of reasoning they are more helpful in initiating and assessing rule of law promotion efforts. If a thin and modest conception of the rule of law is adopted, the task of devising policies and assessment procedures which are aimed at creating or strengthening the rule of law is much more manageable than in the case of a thick conception, simply because there are less standards that have to be met. This complexity-reducing aspect of the thin conception can be seen clearly in Bedner's exceptionally clear overview of relevant legal and empirical items in rule of law research and assessment, which is annexed to this Inventory Report.<sup>29</sup>

#### **4. Thinner conceptions**

##### **(a) General meaning**

In essence, thinner conceptions of the rule of law mean that law should rule the conduct of people. The thin conception applies to the relation between governmental officials and citizens as well as to the relation among ordinary citizens; both vertical and horizontal interactions are to be ruled by laws.

As far as the relation between law and government is concerned, a distinction can be made between rule by law (government *per leges*) and rule of law (government *sub lege*). The first means that governmental power is to be exercised through or via laws. The second requires that officials exercise power in accordance with the law.<sup>30</sup>

Many caveats and clarifying remarks can be made with respect to the general description that was just given of the thinner conceptions of the rule of law. Doing so would burden this

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<sup>28</sup> Of course, those who are more inclined towards thick conceptions may not be particularly impressed by this conceptual clarity. A rule of law conception which leaves out many human rights and democracy is as useful as a conception of art which focuses on the way art is brought about, and leaves out any reference to its aesthetic value. But consider the argument by R. Peerenboom in 'Let one hundred flowers bloom, one hundred schools contend: Debating the rule of law in China', in: 23 *Michigan Journal of International Law*, 2002, 471-544: '...in the rare case of a rule-of-law-compliant authoritarian government misusing law for normatively reprehensible ends, there surely are more direct and telling criticisms of the regime than that it is violating rule of law. A dictator who commits racial or ethnic genocide, or a corrupt authoritarian leader that misuses the legal system to advance the economic interests of his family and cronies while turning a blind eye to widespread, abject poverty and human suffering, surely deserves to be subject to moral censure. Still, to claim that they are violating rule of law somehow misses the point. To focus on rule of law violations in the case of Hitler, Pol Pot, or South Africa highlights the wrong normative issues. Expanding the concept of the rule of law makes such criticisms possible, but at the price of obscuring the primary virtues of rule of law, thus increasing the likelihood that discussions of the rule of law will get bogged down in disagreements over such insolvable issues as positive versus natural law, the nature of justice, the merits of socialism versus liberal democracy, and so on'.

<sup>29</sup> A. Bedner, 'Towards meaningful rule of law research: an elementary approach', Van Vollenhoven Institute Publication Series, 04/03, Leiden, 2004.

<sup>30</sup> For the distinction between government *sub lege* and *per leges*, see N. Bobbio, 'The rule of law or the rule of man', in: *The future of democracy; A defence of the rules of the game*, Minneapolis, 1987, 138-146

inventory report too much. Besides, many caveats are all too obvious, for instance, that the rule of law is not meant to govern all forms of human interaction, such as love affairs. Two points, however, are useful. First, the ideal of the rule of law can never be fully realised. The laws which are to govern need to be made and interpreted, and this process can ultimately not be subjected to laws, for even a constitution is man-made and changeable by men, and must be interpreted by men. The ideal can however be realised to a great extent in that all executive officials and almost all legislative and judiciary officials can be made accountable before the law. Secondly, it is clear that the concept of the rule of law originates in the West and that the term law traditionally refers to norms which originate somehow from the state (legislature or judiciary). What is little, if at all, discussed, however, is whether less formal norms, for instance so-called organisational rules ('Quoting without properly acknowledging one's source constitutes plagiarism, and may result in expulsion from the law school') or informal norms ('If a cow trespasses land and damages the crops, the owner is responsible, but only if he negligently or intentionally herded his cows into his neighbour's land') also fall under the ideal of the rule of law, or, perhaps more importantly, whether the rule of law can exist in the absence of state-law<sup>31</sup> This issue is important, since many current studies on rule of law promotion are distrustful about legal transplants, and emphasize the need to make use as much as possible of existing legal frameworks and dispute resolution mechanisms. Can the rule of law exist when people are governed by norms which are not laws in the ordinary Western meaning of the term? In other words, to what extent is the rule of law compatible with the phenomenon of legal pluralism?<sup>32</sup>

## (b) Requirements

The thinner conceptions of the rule of law presuppose that a number of requirements are met. Some of these requirements regard the characteristic features of the laws which are to rule. Other requirements concern institutions that are necessary for the rule of law to exist. These requirements of the rule of law are usually presented in the form of a list.

### (i) The laws

Fuller, for example, states that the laws should be general, publicly promulgated, prospective, intelligible, consistent, practicable, not too frequently changeable and congruent with the behaviour of the officials of the regime.<sup>33</sup>

Finnis similarly lists eight principles: rules are prospective, possible to comply with, promulgated, clear, coherent with one another, sufficiently stable, the making of decrees is limited, and officials are accountable for compliance with the rules, government sub lege.<sup>34</sup>

Rawls gives four requirements: ought, implies, can, similar cases are to be treated similarly, the principle of legality in criminal law, fair trial.<sup>35</sup>

Raz states that laws should be prospective, open and clear; relatively stable; lawmaking must be guided by open, stable, clear and general rules; there must be an independent judiciary; a fair trial must be guaranteed; courts must be accessible; courts must have power to review

<sup>31</sup> For a useful distinction between five normative systems: state law, organizational rules, informal control, contracts and personal ethics, see R.C. Ellickson, *Order without law; How neighbors settle disputes*, Cambridge, Mass. 1991. The example of the informal rule on crop-damage, which is in use in Shasta County, California, despite the fact that the legal regime imposes strict liability on the owner of the cow, is taken from this book.

<sup>32</sup> Summers, for instance, explicitly identifies the rule of law with state-made law and thus seems to rule out a more informal understanding of the rule of law (Summers: 1693). To be sure, the term legal pluralism not only refers to the co-existence of state law with informal norms, but may also refer to the co-existence of various legal orders.

<sup>33</sup> L. Fuller, *The Morality of Law*, 1976, 33-94. To avoid misunderstanding: Fuller's list is presented here, as elsewhere, in the context of the thin conception of the rule of law, which excludes many normative requirements, especially (most) human rights. Fuller emphasized that the list has an inner morality, a point which is endorsed here, as will be explained later: it serves the aims of certainty and formal equality. Fuller, however, presented his list and its value in the context of the debate about legal positivism. He argued that a concept of law which pretends to exclude any normative considerations, i.e. the positivist conception of law, is mistaken. His rule of law list can, however, be presented independently from this controversy about the proper concept of law.

<sup>34</sup> J. Finnis, *Natural Law and Natural Rights*, Oxford, 1980, 270-1.

<sup>35</sup> J. Rawls, *A Theory of Justice*, 1993, 236-9.

implementation of other principles; the discretion of crime-preventing agencies should not be allowed to pervert the law.<sup>36</sup>

It is not useful to compare these and other lists in detail, and discuss whether they are entirely interchangeable or whether there are minor differences. Clearly, there is significant overlap. The following list may thus be presented as representative of a large body of scholarship.

The first few items concern the nature of the law which is to rule. One of the guiding thoughts behind these items is the famous principle that 'ought implies can': if people ought to obey the law, the law must be such that it can in fact be obeyed, for it is nonsense to oblige people to do the impossible.

This entails, firstly, that laws are prospective; one cannot be guided today by a rule which does not yet exist, and which cannot be foreseen to exist in the near future. It further requires that laws are appropriately clear and determinate in meaning. The laws must also be adequately promulgated, published or otherwise made accessible to their addressees. There must be clear criteria for determining the validity of laws, so that there can be no doubt that a norm is a law. Furthermore, the law must be relatively stable, once made and put into effect, it must not be changed too often. Moreover, laws are to have the form of general rules, that is to say, they have to be applicable to classes of persons, acts, circumstances, and the like, rather than have the form of specific decrees, which are aimed at specific persons, situations etc.

To avoid misunderstanding it is perhaps useful to add that requirements of prospectivity, clarity and the like apply not only to what may be called primary norms ('Do this', 'Do not do that') but also to possible remedies, sanctions, nullifications, or other adverse consequences of failure to comply with the law. People should not only be aware of what they are supposed or allowed to do, but also of the legal consequences for failing to abide by the law. Furthermore, it is obvious that the requirement of generality cannot be met by all laws. For all legal systems rely to some extent on decrees, orders and other laws which are targeted at specific people or situations, and it would be impossible or at least highly inconvenient for legal systems to do without such laws. What is important, then, is that topics which lend themselves to regulation by means of general laws are regulated by general laws, criminal law is an important example. And that the making, changing, proper legislative authority and the like of specific laws is regulated itself by laws which meet the requirement of generality; in other words, the rule of law requires that the making of particular laws is to be guided by general, stable, clear general laws.

#### (ii) The judiciary

A second set of items concerns an institution which is necessary for the rule of law to exist, an independent judiciary. In cases of dispute, a politically independent and impartial system of courts exists and has power to determine which laws are applicable and valid in the case; to resolve issues of fact; and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretive methodology. The judiciary resolves disputes among citizens, but also between citizens and government, which is why it needs to be politically independent and why the rule of law thus entails some form of separation of powers. There must be an appellate court, which sees to it that possible mistakes are corrected, but when legal remedies are exhausted, judicial decisions as to the facts and legal merits of the case must be final, and must be respected as such by all parties to the dispute, especially by the government itself. Furthermore, the right to a fair trial, or in Anglo-American parlance, principles of natural justice must be guaranteed. There must be a fair and open hearing, absence of bias, a reasonable period within which the case is heard and decided, and the like. Furthermore, there must be a recognised, organised and independent legal profession, which is legally empowered and willing to provide legal service. In addition to this, the courts must be easily accessible, for instance in terms of financial costs (court fees, lawyer fees, and so on) imposed on litigants. Moreover, there must be an agency or organisation, a prosecutor, which is also to some degree independent from the governmental apparatus, and which sees to

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<sup>36</sup> Raz at pp 214-219.

it that violations of the law, which do not result in complaining victims, can be brought before the courts.

Obviously this set of requirements relating to the judiciary is based on Western legal systems. It is often suggested that non-Western alternative forms of dispute resolution exist which are equally or perhaps better qualified to resolve disputes in an impartial and independent way.

#### (c) Aims

From the existing scholarly work it would seem that the thinner conceptions of the rule of law just described have four main aims or values.

First, the rule of law generates predictability or certainty. If law governs the behaviour of governmental officials and citizens, it becomes possible to predict in advance the likely outcome of their actions, as well as of one's own actions. Sometimes, the predictability that results from the rule of law is described as freedom or liberty of action, people can act whichever way they like within the bounds set by the law. Since the rule of law, thinly conceived, is compatible with severe authoritarianism, it seems more appropriate, however, to describe its value as consisting of predictability.

Secondly, the rule of law, or rather the more specific aspects of rule of law and rule by law, prevents, or at least hinders, the arbitrary exercise of power. If governmental power is exercised according to pre-established legal rules, if officials are subject to the law, then the possibilities of officials to use their power for personal gain or out of vengeance or favouritism are restricted, because the law does not always, perhaps even seldom or never, authorise them to act in a way that satisfies these desires.

Thirdly, the rule of law promotes formal equality, like cases are treated alike, and unlike cases differently. For laws provide a general frame of reference, and do not admit, at least within the parameters of the category of citizens to whom it applies, provisions to be made to the advantage or disadvantage of a particular individual.

Fourthly, the rule of law provides order, in the sense that peaceful cooperation is likely to occur if most people most of the time obey the law.

The aims just mentioned may be termed the immediate aims of the rule of law, if the requirements mentioned above are in fact met, then human interaction is characterised by predictability; the absence, to a large degree, of arbitrary power; formal equality and order. Of course, further aims may be served by the rule of law. The claim is often made, for instance, that the rule of law facilitates economic growth, because of the predictability and peacefulness of human interaction it generates. Whether this causal link between the rule of law and predictability on the one hand, and economic growth on the other hand, exists, however, is still under debate, as will appear briefly in section 6 below. For this reason, the further aims are not considered as aims of the rule of law in accordance with the thinner conceptions of the rule law.

#### (d) A caveat about the thinner conceptions

A final remark is made in conclusion. This report suggests that of all the definitions which have been brought forward the thinner conceptions of the rule of law are probably the most adequate starting point for a meaningful exchange of views on rule of law promotion. The conceptions are defined as 'thinner' primarily because they exclude extensive substantive ideals, the most prominent of which are human rights. It is somewhat debatable, however, whether this position can be maintained strictly. First, it has already become clear that the rule of law depends on impartial and independent dispute resolution mechanisms, a judiciary, and that this entails respect for principles of natural justice or due process or a fair trial. Obviously, the right to a fair trial is protected by almost all, if not all constitutions and international human rights treaties.

Secondly, and related to the former point, all rule of law theorists assume that a fair trial entails access to justice or legal aid; if people do not have the means to initiate legal proceedings or defend themselves in court, then obviously the rule of law offers no protection to all against people who violate the law. Thirdly, the rule of law requires a certain level of education, since the ability of people to obey the law presupposes that they have some basic knowledge of the law, and knowledge is not simply generated by publishing laws.<sup>37</sup> Fourthly, it is questionable whether governmental officials will in fact be accountable before the law if there is not a certain amount of free speech, a free press and perhaps a freedom of assembly. For how else are violations of law by governmental officials supposed to become known? Probably, additional points could be added, but the main point is clear by now: in practice it is less easy to distinguish the thinner conceptions of the rule of law from thicker conceptions which include more substantive rights than was suggested earlier.

One can of course respond to this by saying that the human rights which do seem to be involved in the rule of law constitute a relatively modest list, compared with human rights treaties and bills of rights. A perhaps more satisfactory solution is to draw a distinction between requirements of the rule of law and conditions of the rule of law. The former category consists of essential elements of the meaning of the rule of law; the latter consists of conditions that need to be fulfilled for the rule of law to be effective in practice. This approach is indeed taken here. Thus, for the sake of a clearer analysis, rights to legal aid, education, and free speech are considered as conditions of the rule of law rather than as requirements. The right to a fair trial, however, seems to be a requirement rather than a condition.

## **5. Conditions of the rule of law**

A common thread which runs through almost all academic writing on rule of law promotion is the criticism of what is usually called institutionalism or institutional optimism, that is, the view that the rule of law can be created or strengthened principally by establishing a few institutions and legal instruments, such as a judiciary which is properly trained, equipped and staffed; a set of constitutions, penal codes and the like, etcetera.<sup>38</sup> Lawyers in particular are said to be prone to believe that all is going to be well as soon as the proper legal tools are in place. In fact, as we all know, law in the books does not result automatically in law in action.

Otto has introduced the term real legal certainty to describe the rule of law in action, as opposed to the rule of law in the books. He defines real legal certainty as the chance that in a given situation laws exist which meet the requirements of generality, clarity, prospectivity and accessibility; that governmental officials consistently apply these laws and abide by these laws themselves; that most citizens abide by these laws; that independent and impartial judges apply these laws consistently in resolving disputes; and that judicial decisions are actually carried out.<sup>39</sup>

Whether real legal certainty exists, depends, first of all, on the nature of the rules; secondly, on the institutions that apply and create the law; and thirdly, on the wider cultural, political and economic context. It is to this third aspect that we shall now turn. This shall be done by firstly looking at the notion of legal culture and the manner in which recent scholarly work on the rule of law assesses this notion and secondly by looking at what has been said about political and economic conditions and the effect they may have on rule of law promotion.

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<sup>37</sup> The second and third points are made in N.W. Barber, 'Must Legalistic Conceptions of the Rule of Law Have a Social Dimension?', in: *Ratio Juris*, vol. 17, nr. 4, 2004, pp 474-88.

<sup>38</sup> M. Krygier, 'Institutional Optimism, Cultural pessimism and the rule of law', in: M. Krygier en A. Czarnota, *The rule of law after communism; Problems and prospects in East-Central Europe*, 77-105. Please see Professor Michael Bohlander and Dr. Kaikobad's book on *International Criminal Justice: A Critical Analysis of Institutions and Procedures*, Cameron May Ltd, International Law Publishers, 2007.

<sup>39</sup> J.M. Otto, *Reële rechtszekerheid in ontwikkelingslanden*, Leiden, 2000, at 4-5

(a) Legal culture

One of the recurring themes in recent literature on rule of law promotion is the importance of legal culture. No matter how sophisticated, well-planned and thought-through the legal institutions and rules are that donor states are trying to build or strengthen, as long as such institutions are not functioning in a setting where certain values or beliefs are shared, they will hardly have any effect.

Stromseth, Wippman and Brooks argue that:

'The rule of law is as much a culture as a set of institutions, as much a matter of habits, commitments, and beliefs of ordinary people as of legal codes. Institutions and codes are important, but without the cultural and political commitment to back them up, they are rarely more than window dressing'.<sup>40</sup>

Carothers likewise argues that:

'clearly law is not just the sum of courts, legislatures, police, prosecutors, and other formal institutions with some direct connection to the law. Law is also a normative system that resides in the minds of the citizens of a society'.<sup>41</sup>

Sometimes, the point is made even stronger: culture is more important than institutions. Krygier, for instance, notes that the 'essence' of the rule of law is the belief that 'law matters and should matter'.<sup>42</sup> Kleinfeld Belton likewise argues that:

'...many rule-of-law ends are upheld even when institutional arrangements are far from supportive, if countries have social and political cultures that place a premium on the rule of law. The converse is also true: recalcitrant cultures or balking politicians can undermine even well organised rule-of-law institutions'.<sup>43</sup>

Whether this insight also informs rule of law promotion programs in practice is unfortunately a matter of speculation. Donor organisations hardly ever explain how, exactly, the programmes carried out by them or on their behalf aim to contribute to building or strengthening the rule of law. Yet it seems plausible that a fair amount of rule of law programmes is targeted at shaping or creating a rule of law culture. Programmes involving media campaigns and education about the rule of law from primary school onwards seem to be clear examples of this.

Given the importance attached to it, one would expect that rule of law scholarship would by now have a pretty clear concept of legal culture as relevant for rule of law promotion. If such conceptualisation and understanding exists in rule of law promotion scholarship, it has escaped the attention of the authors of this report. Indeed, the fact that the authors mentioned above largely develop their arguments without referring to sources indicates that this is one of the lacunae in rule of law scholarship. This does not mean that there are not valuable ideas with regard to the way a rule of law culture can be created or strengthened, some lists with do's and don'ts. Before discussing these, however, it is useful to have a very brief look at wider scholarship on the concept of legal culture, in order to identify one of the possible starting points for further research in this area, and to clarify the issue of legal culture a little.

The concept of legal culture originates from and is used with some frequency in the sociology of law, in particular in comparative analysis of differences between countries. It is not useful to burden this Inventory Report with a summary of different sociological conceptions of legal culture. Suffice it to say that most of these conceptions do not correspond with what authors

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<sup>40</sup> Stromseth, Wippman & Brooks: 310.

<sup>41</sup> T. Carothers, 'The problem of knowledge', in: idem, *Promoting the rule of law abroad; In search of knowledge*, 2006, 15-28, at 20.

<sup>42</sup> M. Krygier, 'Marxism and the rule of law: Reflections after the collapse of communism', in: 15 *Law and Social Inquiry*, 1990, at 646.

<sup>43</sup> Kleinfeld Belton: 22; italics added.

like Kleinfeld Belton have in mind when they stress the importance of legal culture.<sup>44</sup> What these authors have in mind corresponds with what the sociologist Friedman had in mind when he coined the term legal culture: the values, opinions and behaviour towards the legal system, conceived of as a set of rules and legal institutions (judiciary, legislative, police, etc). Friedman usefully distinguishes between internal and external legal culture:

'The external legal culture is the legal culture of the general population; the internal legal culture is the legal culture of those members of society who perform specialized legal tasks', i.e. lawyers, judges, legislators and others who work in the 'magic circle of the legal system'.<sup>45</sup>

As way of an example, if a government official learns that a judge will shortly decide a case which could be embarrassing for the governmental apparatus, will he pick up the phone and try to pressure the judge into giving a favourable ruling for the government, or will he nervously wait for the outcome of the case, because he respects the independence of the judiciary, and holds that the government should be held accountable if it has violated the law?

Friedman's concept brings some clarity and it implicitly underlies discussions on legal culture in rule of law promotion as is for instance testified by the fact that scholars often emphasize the need to go beyond trying to shape the values of governmental officials and to create a rule of law culture among ordinary citizens at the grassroots level. For instance, by investing in education about the rule of law from primary school onwards or by popularising the rule of law through the media. Still, there are questions that need to be answered. When one reads the papers mentioned above, one often gets the impression that the issue of legal culture comes down to whether citizens or officials subscribe to the ideal of the rule of law and act accordingly in that they obey or make use of the law (by solving a dispute through courts rather than in informal ways, for instance). Is this correct or does the concept have other meanings which are useful for the study of rule of law promotion? Can the existence or absence of a legal culture be measured and if so, how? To what extent can citizens in fact believe in the ideal of the rule of law and act in accordance with the law, if they strongly disagree with the content of the laws? A question that seems to be of some relevance if the thinner conceptions are used as a starting point: should rule of law promotion (thinly conceived) go hand in hand with policies aimed at human rights observance or other substantive standards?<sup>46</sup> What is then the causal link between legal culture and the rule of law?

As a World Bank brief on the issue of legal culture elaborates:

'Does the legal system not work well because people distrust the courts, or do people distrust the courts because the legal system doesn't work well? Is the introduction of a new contract law unlikely to have an effect because the business culture prefers informal deals with family and friends, or does the preference for informal dealing exist only because no one has yet passed efficient contract law? These sorts of problems are not easy to resolve, especially because the causality clearly runs in both directions, and the interactions between beliefs and actions are extraordinarily complex'.<sup>47</sup>

As mentioned before the lack of conceptualisation has fortunately not prevented scholars from recommending policies on how to create or strengthen a rule of law culture. By way of

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<sup>44</sup> In the view of some authors, legal culture covers not only attitudes, values and beliefs about the legal system, but also so-called law in action, that is, the way rules and institutions function in practice (litigation rates, the time a court case takes on average, etc) and to some extent legal rules (whether a plaintiff or defendant is required to hire an attorney when starting a case in court). To cite one of the leading scholars in this field: 'Legal culture, in its most general sense, is one way of describing relatively stable patterns of legally oriented social behaviour and attitudes. The identifying elements of legal culture range from facts about institutions such as the number and role of lawyers or the ways judges are appointed and controlled, to various forms of behaviour such as litigation or prison rates, and, at the other extreme, more nebulous aspects of ideas, values, aspirations and mentalities. Like culture itself, legal culture is about who we are and what we do' (D. Nelken, 'Using the concept of legal culture', in: *29 Australian Journal of Legal Philosophy*, 2004, 1-26).

<sup>45</sup> L.M. Friedman, *The Legal System*, 1975, at 193-4.

<sup>46</sup> For the suggestion that the acceptance of the content is more important than enforcement by courts and police, see T. Carothers: 20-1.

<sup>47</sup> At <http://www1.worldbank.org/publicsector/legal/ruleoflawanddevelopment.htm>

concluding this section, it is perhaps useful to give an idea of what such advice looks like by selecting four items from a list that has been developed in the context of an analysis of rule of law promotion in so-called post-conflict societies.

First, it is unlikely that citizens or officials will gain respect for the rule of law if organisations involved in rule of law promotion violate these values themselves. This means, among other things, that these organisations, too, must obey the law and be accountable before the law for their actions. Rule of law promotion must, in other words, be credible. Secondly, it is unlikely that citizens and officials will recognise the value of the rule of law if donor organisations do not engage with them. Donor organisations must act collaboratively, and to the extent that the donor is a state with a controversial standing, multilateral action is to be preferred. Language skills are of the utmost importance. Thirdly, to the extent that rules or informal mechanisms exist for resolving disputes which share the spirit of the rule of law, these rules and mechanisms should be used rather than formal arrangements exported from donor states. Fourthly, NGOs of all sorts can help foster the rule of law, by helping to ensure an educated and engaged citizenry.<sup>48</sup>

#### (b) Political conditions

The famous British philosopher Thomas Hobbes (1588-1679) was mistaken in arguing that order is the only important aim of politics. But he was most certainly right in emphasizing that order is of paramount importance. Without order there will be no rule of law, respect for human rights and economic development. It is no coincidence that the importance of security and order is stressed in current scholarship on rule of law promotion efforts in so-called post-conflict societies. Stromseth et al., for instance, write: 'Absent basic security, efforts to reform political institutions, adopt new laws, promote national reconciliation, and jump-start economic growth are destined to fail'.<sup>49</sup> Security, however, is the sine qua non of the rule of law in any context and measures to strengthen the capacity of the state to provide order and peace may thus be said to contribute to rule of law promotion in any context. The ideal of the rule of law is to a large extent about limiting the exercise of the power of the state over its citizens but this ideal is meaningless if there is no power to begin with.

Another issue is whether a particular system of government (democracy, monarchy, etc) is required for the rule of law. There are two main ways in which political preconditions in this sense to the rule of law can be assessed, empirical and conceptual. The former would involve looking at particular states and legal systems in operation. The prevailing political conditions and the manifestations of the rule of law could be assessed, and conclusions drawn from the correlation between the regimes and the levels of adherence to the rule of law. The other, more conceptual or theoretical way of looking at the same problem would involve trying to see which political solutions are either clearly necessary for, or manifestly incompatible with, the very notion of the rule of law.

The empirical approach suffers from the problem that determining the extent to which the rule of law applies in a given state is not a very straightforward business. As has been demonstrated, the rule of law is a multifaceted notion. Moreover, each of its dimensions, independence of the judiciary, for instance, comes in shades of grey and not as a black or white phenomenon. The same can certainly be said about political regimes. It is no mean task to divide states into neat categories like 'liberal' and 'totalitarian', 'democratic' and 'non-democratic'.<sup>50</sup>

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<sup>48</sup> Stromseth, Wippman & Brooks, pp 310-46.

<sup>49</sup> Stromseth et al.: 134, and their discussion at 134-177. See also K. Samuels, *Rule of law reform in post-conflict societies; operational initiatives and lessons learnt*, Social Development Papers: Conflict Prevention and Reconstruction, Paper nr. 37, October 2006, at <http://www.worldbank.org/conflict>.

<sup>50</sup> The phenomenon of illiberal democracies makes such classifications even more problematic. See, e.g., F. Zakaria, 'The Rise of Illiberal Democracy', *Foreign Affairs* (November/ December 1997).

This said, some interesting empirical findings have been made as regards the connection between the rule of law and the political regime. One relevant statistical analysis, conducted by Rigobon and Rodrik, has focused on the interrelationship between the rule of law, democracy, openness, and income,<sup>51</sup> while relying on widely used economic data, and indicators of democracy, constraint on the executive, and the rule of law.<sup>52</sup> For present purposes, it is important to note their finding that 'better democracy improves the rule of law' and that the rule of law has (some) effect of furthering democracy.<sup>53</sup> This suggests that, at least statistically, democracy and the rule of law are mutually reinforcing.

However, Peerenboom, using a thinner conception of the rule of law,<sup>54</sup> has demonstrated (by using largely the same indicators) that this is not the whole truth.<sup>55</sup> Notably Singapore and even more so, Hong Kong, show significant deficits of democracy, though they are widely considered exemplary in terms of the rule of law.<sup>56</sup> The same applies to a number of Arab countries such as Bahrain, Kuwait and UAE. Conversely, Guatemala, Kenya and Papua New Guinea may be considered highly democratic, while doing very poorly as far as the rule of law is concerned.<sup>57</sup> Peerenboom's central conclusion in this regard is that the rule of law and democracy 'need not necessarily march in lock-step'.<sup>58</sup>

More conceptually oriented writings of legal theorists lend support to this view. As was pointed out in section 3 the thinner conceptions of the rule of law are in themselves void about the mode or ideology of the government from which that law emanates. The thinner conceptions are not about who governs but about how the government exercises its power. Thus the rule of law can be compatible with non-democratic regimes. Tamahana, for instance, observes that '[a]uthoritarian regimes that adhere to formal legality have existed'.<sup>59</sup> As was emphasized before however, many proponents of the thinner conceptions (including this report) hold that democracy is the best system of government and that a democratic rule of law system is to be preferred over non-democratic rule of law regimes.

Two points must however be added, which qualify the statement that the rule of law is compatible with widely different regimes. First, the rule of law requires some degree of a separation of powers, as was pointed out before. There must be a judiciary, which is independent from the legislative and executive powers. A one-party regime, where all branches of the government, while nominally separated are controlled from party headquarters, will therefore have a very hard time conforming to the rule of law ideal, even as thinly defined. Indeed, it has been argued that the fragmentation of political power and in particular party competition set the stage for independent courts.<sup>60</sup>

The second point regards ideology. The distinction between the rule of law and the 'rule of good law' maintained by legal theorists suggests each and every political regime or ideology can be made compatible with the rule of law and it is just that most totalitarians cannot be bothered with the niceties of legalism. Yet this may not be entirely correct. Illuminating in this respect has been the discussion as to the relationship between Marxism and the rule of law, which

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<sup>51</sup> R. Rigobon & D. Rodrik, 'Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships', NBER Working Paper No. W10750 (September 2004), available at <[ssrn.com/abstract=590745](http://ssrn.com/abstract=590745)>.

<sup>52</sup> Including the Polity IV scale and the World Bank's Rule of Law index.

<sup>53</sup> Rigobon & Rodrik: 18.

<sup>54</sup> R. Peerenboom, 'Let one hundred flowers bloom, one hundred schools contend: Debating the rule of law in China', in: 23 *Michigan Journal of International Law*, 2002, 477-544, at 477-85.

<sup>55</sup> R. Peerenboom, 'Law and Development of Constitutional Democracy in China: Problem or Paradigm?', 19 *Columbia Journal of Asian Law* (2005) 185-234.

<sup>56</sup> Peerenboom (2005): 202; for a discussion, see R. Peerenboom, 'Varieties of Rule of Law: An Introduction and Provisional Conclusion', in R. Peerenboom (ed.), *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the US* (Routledge Curzon, 2004) 1-55.

<sup>57</sup> See Peerenboom (2005).

<sup>58</sup> *Ibid.* at 201.

<sup>59</sup> Tamahana: 95, citing in his support R. Barro, 'Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile', in J. M. Maravall & A. Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press, 2003) 188-219.

<sup>60</sup> R. B. Chavez, *The Rule of Law in Nascent Democracies: Judicial Politics in Argentina* (Stanford University Press, 2004).

intensified first in connection to the perestroika in the Soviet Union<sup>61</sup> and later in the context of the total collapse of Communist regimes in Eastern Europe.<sup>62</sup> Martin Krygier, for one, has underlined that the rule of law as an attempt to institutionalise restraint on power through law is an idea completely foreign to Marxism.<sup>63</sup> Rather, in the words of Hugh Collins, '[t]he principal aim of Marxist jurisprudence is to criticize the centre-piece of liberal political philosophy, the ideal called the Rule of Law'.<sup>64</sup> Marxism was consciously opposed to the rule of law.

A telling example is perhaps the philosophy of Soviet criminal law, where the punishment of conduct was based on 'social dangerousness' and not so much on the violation of a specific rule. The extreme version of this theory, implemented in the early days of the Soviet Union, meant that whatever the courts considered socially dangerous could be punished (by reference to the most similar offence on the books).<sup>65</sup> Although the nullum crimen sine lege principle was later introduced (at least in theory), 'conveniently' broad formulations of, for instance, 'counterrevolutionary action'<sup>66</sup> still served the purpose of punishing virtually any activity that the courts could interpret as 'anti-Soviet'. Thus, the rule-of-law-requirements of clarity and prospective application were clearly violated.

All in all, it can be said that the rule of law, thinly conceived, is in principle compatible with different political regimes. However, in light of the points made above, one might wish to qualify the view of Carothers who notes that '[d]espite the close ties of the rule of law to democracy and capitalism, it stands apart as a non ideological, even technical, solution'.<sup>67</sup>

#### (c) Economic conditions

It has been said that the rule of law requires among other things an independent judiciary to which citizens have access. Therefore, the rule of law costs money and presupposes some degree of economic development. There does not seem to be a controversy among rule of law scholars on whether the rule of law presupposes a particular economic regime. There seems to be consensus that the rule of law is in principle compatible with different forms of market economies (different as regards degree, nature and manner of government intervention) as well as with socialist economies.

What is debated among rule of law scholars is the opposite link between the rule of law and economic development: is the rule of law a prerequisite of economic development or does it at least contribute to economic development? Putting it somewhat more extremely: can economic development occur without the rule of law?<sup>68</sup> Is the rule of law the path to development, or is it, at best, a highly desirable result of development?

It is obvious why this debate is high on the agenda: UNDP, the World Bank and many other organisations invest in rule of law promotion because they believe the rule of law contributes to economic development. Economic development is the rationale of many rule of law promotion efforts. The current report did not provide an opportunity to make an overview of the literature in this field. Suffice it to say that, here too, there does not appear to be a clear consensus. The establishment by the UN Secretary-General of the Legal Commission on the Legal Empowerment of the Poor could perhaps be seen as an interesting experiment dealing with this

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<sup>61</sup> See, e.g., Symposium 'Perestroika in Soviet Legal Institutions', 15 *Law & Social Inquiry* (1990), issue 3, especially W. E. Butler, 'The Rule of Law and Soviet Legal Transformations', 15 *Law & Social Inquiry* (1990) 527-533.

<sup>62</sup> See, e.g., Debate: 'Marxism and the Rule of Law', 15 *Law & Social Inquiry* (1990), issue 4.

<sup>63</sup> M. Krygier, 'Marxism and the Rule of Law: Reflections after the Collapse of Communism', 15 *Law & Social Inquiry* (1990) 633-663.

<sup>64</sup> H. Collins, *Marxism and Law* (Oxford, 1982) at 240.

<sup>65</sup> Art. 16, Criminal Code of the Russian SFSR (1926).

<sup>66</sup> Art. 58-1, Criminal Code of the Russian SFSR (1934).

<sup>67</sup> See T. Carothers, 'The Rule of Law Revival', *Foreign Affairs* (March/April 1998).

<sup>68</sup> See, among many others, S. Golub, 'A house without a foundation' and 'The legal empowerment alternative' and F. Upham, 'Mythmaking in the rule-of-law orthodoxy', all in Carothers, *Promoting the Rule of Law Abroad*, at 105-136, 161-190 and 75-104 respectively; L. Tshuma, 'The political economy of the World Bank's Legal framework for economic development', in: *Social and Legal Studies*, 1999, vol. 8(1), 75-96; D. M. Trubek and Santos, *The new law and economic development: A critical appraisal*, Cambridge, 2006; K. Dam, *The law growth nexus: The rule of law and economic development*, 2006, Washington DC.

question: will putting in place effective and enforceable land registration rights have a profound effect on the rule of law? Hiil will follow this closely.

## **6. International legal instruments**

As noted in the introduction, many means or instruments of rule of law promotion are currently employed. The Practice Part of the Inventory Report by IDLO provides insight into the huge variety which exists. A specific focus of this Inventory Report, however, as discussed during the 2006 Wassenaar meeting, is whether international legal instruments can be of use in creating or strengthening the rule of law. This is a particularly relevant question in so-called post conflict situations in which a state that has fallen victim to massive conflict needs to re-establish itself. In such cases even the most basic elements of order are often lacking and international instruments can be the only inspiration or source of any kind of legality.

This issue is complicated for two reasons. First, as far as human rights treaties are concerned, little is known about the effectiveness (in terms of observance on a national level) of such treaties,<sup>69</sup> or about the extent to which international treaties constrain or steer the development of constitutional law on a national level.<sup>70</sup> Secondly, human rights treaties typically involve many political, social and economic rights which are not part of the thinner conceptions of the rule of law (the right to a fair trial is the obvious relevant right from the perspective of the thin conception). What can be said, however, is that international instruments, especially human rights treaties, are an important part of the rule of law rhetoric<sup>71</sup> and in that sense they are at the very least an important point of reference. Whatever their contents, they embody the idea that there are 'rights' (and certain very 'basic' ones to boot) to which people can be 'entitled'.

The only topic about which relatively much is known and which is relevant in rule of law promotion, particularly in post-conflict societies, is the issue of transitional justice. To avoid misunderstandings, it should be pointed out that transitional justice is about the exceptional rather than the ordinary situation and that not all forms of transitional justice qualify as international legal instruments.

Like the rule of law, transitional justice is a complex socio-legal phenomenon. According to a recent report of the UN Secretary-General, it 'comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'.<sup>72</sup> Such processes and mechanisms are indeed very diverse. They may be of a judicial or of a non-judicial nature, or anything in between. They may have varying levels of involvement by the world community, from having a completely international character to having no international participation at all.

Among specific measures of transitional justice, the establishment of human rights institutions, implementation of public service vetting processes, reparation programmes, investigations, fact-finding and commissions of inquiry are sometimes mentioned.<sup>73</sup> Yet the bulk of discussion on transitional justice concentrates on a more limited range of issues. Central stage has been given to criminal trials conducted before national, international or hybrid courts over perpetrators of human rights violations, non-judicial truth and reconciliation processes, as well as the important question of the choice and balance between the two.

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<sup>69</sup> On this issue, see (the literature discussed in) O. Hathaway, 'Do human rights treaties make a difference?', in: *Yale Law Journal* 111, 2002, 1935-2042; E. Neumayer, 'Do International human rights treaties improve respect for human rights?', in: *Journal of Conflict Resolution*, vol. 49, 2005, 925-53.

<sup>70</sup> See M. Kumm, 'The legitimacy of international law: A constitutionalist framework of analysis', in: *European Journal of International Law*, 15, 5, 2004, 907-31.

<sup>71</sup> Tamanaha: 141.

<sup>72</sup> The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2004/616 of 23 August 2004, para. 8.

<sup>73</sup> See Uniting our strengths: Enhancing United Nations support for the rule of law, Report of the Secretary-General, UN Doc. A/61/636-S/2006/980 of 14 December 2006, para. 41; see also International Center for Transitional Justice, *Annual Report 2004/2005* (New York: ICTJ, undated).

Interestingly enough, the interrelationship between various means to deal with past atrocities and the establishment of the rule of law remains under-researched.<sup>74</sup> This is true despite the increased interest in transitional justice in general, of which numerous scholarly publications,<sup>75</sup> including at least one specialised journal,<sup>76</sup> and significant expert institutions working in the field<sup>77</sup> provide clear evidence. Things may be taking a turn for the better, however, with academic conferences and university level courses taking up this specific issue.<sup>78</sup>

Despite the rather scarce analytical literature, a dual impact of transitional justice on the rule of law has, nonetheless, been identified.<sup>79</sup> Thus, transitional justice measures are seen as having the effect of emphasising the unlawfulness of certain behaviour, as well as contributing to a rule-of-law-related capacity building in the society concerned.

The first aspect of this twofold effect of criminal trials and truth processes on the rule of law has come to be known as the 'demonstration effect' and it works in a variety of ways.<sup>80</sup> First, by means of accountability proceedings, perpetrators of atrocities are removed from office whereby trust in the state and government is hopefully re-established. Secondly, such processes themselves go to show that the violations committed are unacceptable and will no longer be tolerated. Finally, there may be a 'ripple effect' of promoting accountability throughout the society.

On a general level, accountability proceedings can help institutionalise dispute resolution procedures and norms of accountability in the society.<sup>81</sup> But the way in which transitional justice initiatives can contribute more concretely to the domestic rule of law is by assisting in the capacity-building of national justice systems, the second aspect of the twofold effect just mentioned. Unfortunately, these issues are often neglected in practice and almost wholly uncharted waters in academic literature.

To begin with, it has been critically noted that 'until they began focusing systematically on their completion strategies (for wrapping up their own trials and investigations)', neither the ICTY nor the ICTR 'had done very much to help strengthen the ability of local courts to deal with the substantial number of potential suspects remaining to be tried'.<sup>82</sup> While there is something to be said about the efforts of the ICTY in that respect,<sup>83</sup> 'the ICTR has done almost nothing to contribute to the capacity of the Rwandan judiciary'.<sup>84</sup>

This criticism is not entirely fair. While international tribunals may doubtlessly contribute to the construction of domestic legal systems, their primary purpose is to dispense justice. All other things being equal, capacity-building exercises can only be conducted at the expense of judicial work proper. Furthermore, international tribunals that have to begin their work from scratch will in all likelihood be most concerned with capacity-building of their own.

The wisdom of establishing international tribunals to begin with may, of course, also be questioned. From the point of view of strengthening the rule of law, it is indeed doubtful

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<sup>74</sup> See, e.g., J. Stromseth, D. Wippman and R. Brooks, *Can Might Make Rights? Building the Rule of Law after Military Interventions* (Cambridge University Press, 2006) at 253 ('[T]he question of whether and how accountability proceedings can contribute to strengthening domestic justice systems and to building the rule of law in post-conflict societies is surprisingly under analyzed.').

<sup>75</sup> See, e.g., N. J. Kritzer (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (3 vols, Washington, DC: United States Institute of Peace Press, 1995); R. G. Teitel, *Transitional Justice* (Oxford University Press, 2000); J. Elster, *Closing the Books: Transitional Justice in Historical Perspective* (Cambridge University Press, 2004).

<sup>76</sup> *International Journal of Transitional Justice* (Oxford University Press: as of 2007).

<sup>77</sup> Most notably, perhaps, the International Center for Transitional Justice. See <[www.ictj.org](http://www.ictj.org)> for more details.

<sup>78</sup> For example, the 2007 Annual Conference of the Socio-Legal Studies Association will feature a 'stream' of papers on 'Transitional Justice and the Rule of Law'. See <[www.kent.ac.uk/nslsa/content/view/94/84](http://www.kent.ac.uk/nslsa/content/view/94/84)> and <[www.transitionaljustice.ulster.ac.uk/events\\_news/slsa\\_tji\\_2007.html](http://www.transitionaljustice.ulster.ac.uk/events_news/slsa_tji_2007.html)> for more details. In 2006-2007, Georgetown University offers a course titled 'Transitional Justice and the Rule of Law'. See <[www2.georgetown.edu/explore/courses/?CourseID=GOVT-728](http://www2.georgetown.edu/explore/courses/?CourseID=GOVT-728)> for more details.

<sup>79</sup> See Stromseth et al., *Can Might Make Rights?*, supra note 74, at 258-263.

<sup>80</sup> See *ibid.* at 258 et seq.

<sup>81</sup> See, e.g., Stromseth et al., *Can Might Make Rights?*, supra note 74, at 261-262.

<sup>82</sup> *Ibid.* at 265.

<sup>83</sup> *Ibid.* at 265-271.

<sup>84</sup> *Ibid.* at 273.

whether international tribunals are the best solution. One commentator, writing in 1999, rhetorically asked: what would have been the state of the Rwandan justice system today if, instead of spending between forty and fifty million dollars a year on the ICTR, comparable sums of money and effort had been put into assisting the Rwandan government in overcoming the enormous obstacles it faced in the pursuit of criminal accountability?<sup>85</sup> As the author was quick to point out, the question had already been answered by another commentator who had noted that such sums could have produced 'one of the better justice systems in the region'.<sup>86</sup> The problem of international tribunals diverting resources from domestic legal systems has been noted by other authors as well.<sup>87</sup>

In order to avoid, or at the very least mitigate, shortcomings of international tribunals the establishment of internationalised or hybrid courts has increasingly been advocated. There appear to be good reasons for this. First, and most crucially, courts with national participation that are located in affected territories have a more substantive contact with the local society.<sup>88</sup> Thus,

[w]ith respect to affirming the national rule of law, such [local] processes present clear advantages given their impact on greater numbers of people and local institutions, greater representational legitimacy, and greater responsiveness to local audiences in terms of both substantive and procedural law.<sup>89</sup>

This may, indeed, amplify the 'demonstration effect' of trials conducted. But the most immediate practical value may lie in the fact that hybrid tribunals have 'greater potential for domestic capacity-building by involving domestic jurists directly in the work of the court'.<sup>90</sup> The UN Secretary-General has also noted along these lines that locating the tribunal in the affected country

enhances the national capacity-building contribution of the ad hoc tribunals, allowing them to bequeath their physical infrastructure (including buildings, equipment and furniture) to national justice systems, and to build the skills of national justice personnel. In the nationally located tribunals, international personnel work side by side with their national counterparts and on-the-job training can be provided to national lawyers, officials and staff.<sup>91</sup>

All in all, it may be said that, while more research into the matter is desperately needed available literature suggests that the domestic rule of law may benefit from transitional justice processes in several ways. However, it is naïve to simply hope that from, say, the prosecution of human rights violators, the rule of law will somehow emerge. Tools utilised in transitional justice should be conscientiously designed so as to have a specific rule of law agenda if a significant impact on the rule of law is to be anticipated.

## **7. A few remarks on rule of law promotion in practice**

The Practical Part of the Inventory Report as prepared by IDLO provides an overview of rule of law promotion in practice. Nevertheless, it seemed useful in the context of the Academic Part of

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<sup>85</sup> J. E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', 24 *Yale Journal of International Law* (1999) 365-483 at 414.

<sup>86</sup> *Ibid.* at 414-415, citing N. J. Krititz, 'Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights', 59 *Law & Contemporary Problems* (1996), no. 4, 127-152 at 150.

<sup>87</sup> *Supra* note 74, at 262.

<sup>88</sup> See generally Antonio Cassese, 'The Role of Internationalized Courts and Tribunals in the Fight against International Criminality' in C. P. R. Romano, A. Nollkaemper and J. K. Kleffner (eds), *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia* (Cambridge University Press, 2004) 3-13 at @ 6.

<sup>89</sup> *Supra* note 87, at 462.

<sup>90</sup> See *supra* note 7474, at 257. See also L. A. Dickinson, 'The Promise of Hybrid Courts', 97 *American Journal of International Law* (2003) 295-310 at 303-304 and 307.

<sup>91</sup> The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, UN Doc. S/2004/616 of 23 August 2004, para. 44.

the Inventory Report to have a brief look at a few organisations involved in rule of law promotion. This provides some insight into the usefulness of the thinner conceptions outlined in this report and highlights some salient features of rule of law promotion that are generally not much discussed in academic literature on rule of law promotion. The organisations that were looked at are: the Open Society Institute, the UN, the World Bank, the Council of Europe, and USAID.

The full versions of the analyses of these organisations can be accessed on the website of HiIL; below, some general remarks are made. Again, the points that will be made in this section will have to be tested against the practice inventory by IDLO, which is far more comprehensive.

The first thing that is noticeable is that the organisations just mentioned seem to have different understandings of the concept of the rule of law. The UN Secretary-General, for instance, has defined the rule of law as:

'...a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards'.<sup>92</sup>

He has elaborated that the rule of law also requires:

'...measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency'.<sup>93</sup>

This, obviously, is a rather thick conception of the rule of law, because it includes compliance with human rights norms and standards. USAID has a similar understanding of the rule of law:

'The term "rule of law" embodies the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights. A predictable legal system with fair, transparent, and effective judicial institutions is essential to the protection of citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals'.<sup>94</sup>

The Open Society Institute, on the other hand, seems to distinguish the rule of law from human rights and democracy (and a market economy), although it emphatically claims that all these ideals should be promoted to create open societies in Popper's sense. In the words of its latest Annual Report:

'Open societies are characterized by the rule of law; respect for human rights, minorities, and a diversity of opinions; democratically elected governments; market economies in which business and government are separate; and a civil society that helps keep government power in check'.<sup>95</sup>

The World Bank, similarly, seems to have a rather thin conception of the rule of law: The rule of law prevails where:

'...(1) There is a set of rules which are known in advance, (2) such rules are actually in force, (3) mechanism exist to ensure the proper application of the rules

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<sup>92</sup> *Ibid*, para. 6.

<sup>93</sup> *Ibid*.

<sup>94</sup> [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/rule\\_of\\_law](http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law).

<sup>95</sup> *Building Open Societies: Soros Foundations Network 2005 Report* (New York, NY: Open Society Institute, 2006) at 168, available at [www.soros.org/resources/articles\\_publications/publications/annual\\_20060724/a\\_complete.pdf](http://www.soros.org/resources/articles_publications/publications/annual_20060724/a_complete.pdf).

and to follow for departure from them as needed according to established procedures, (4) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial body, and (5) there are known procedures for amending the rules when they no longer serve their purpose'.<sup>96</sup>

A second point is that these different conceptions can partly be explained by the fact that different organisations have different mandates or purposes and that rule of law promotion can only be on the agenda of these organisations if it somehow falls within the mandate or contributes to the purpose of the organisation. The UN Charter, for instance, which stipulates the purposes and principles of the organisation,<sup>97</sup> makes no explicit mention of the rule of law on the domestic level. Thus, rule of law promotion must be connected to the primary goals of the UN. For the rule of law activities, human rights provide one such connection, the enhancement of human rights being one of the primary goals of the UN.<sup>98</sup> Already in the 1948 Universal Declaration of Human Rights it was deemed 'essential ... that human rights ... be protected by the rule of law'.<sup>99</sup> Accordingly, if the rule of law is viewed as a sine qua non for the enjoyment of human rights, then the strengthening of the rule of law falls squarely within the purposes of the UN. For the World Bank, on the other hand, rule of law promotion must somehow be understood to contribute to economic development, and the conception of the rule of law is further constrained by the fact that the Bank's Articles of Agreement, which define its mandate and scope of intervention, prevent the Bank from considering political criteria in its lending.

A third point which deserves to be mentioned is that although there is a wide variety of measures that are currently employed by many organisations involved in rule of law promotion, it is not always clear at which elements of the rule of law such measures are targeted. Obviously, measures such as building courthouses or training judges are aimed at establishing or strengthening an independent and impartial judiciary. But the connection is not always that obvious. Moreover and as has been noted above, many measures or instruments seem to proceed from an institutionalist rather than an ends-based understanding of the rule of law: have donor organisations, for instance, seriously examined whether local, perhaps less formal, ways of dispute resolution are available before measures like building courthouses are considered?

Fourthly, and related to the former, it seems that the organisations involved in rule of law promotion adopt a top-down or supply-driven approach to rule of law promotion. Rule of law promotion means that recipient states establish or strengthen institutions which play a vital role in the rule of law in the West. The idea that rule of law promotion should be organised as a demand-driven activity, which would be more sensitive to local needs and what is locally available (dispute resolution mechanisms, norms, etc) does not seem to play a role.

Finally, there seems to be consensus among various organisations, with the exception of the World Bank, that rule of law promotion should go hand in hand with the promotion of democracy and human rights. Sometimes, this is true by definition, in that all these elements are embodied in the thicker conception of the rule of law that is used. There appears to be little clarity, however, as regards the connection between these elements, and the sequencing and prioritising of the activities in the spheres of the rule of law, democracy and human rights.

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<sup>96</sup> This is the conception of Ibrahim Shihata, general counsel and senior vice president of the World Bank from 1983 until 1998, and 'architect' of the World Bank's rule of law policies, as analysed in A. Santos, 'The World Bank's uses of the "Rule of Law" promise in Economic Development', in *The New Land and Economic Development: A Critical Appraisal*, eds. David Trubek and Alvaro Santos, Cambridge, 2006, 255-300, at 270. It should be noted that other conceptions have been given by Shihata and in other documents from the Bank, which seem to be thicker by requiring compliance with substantive rights (Santos: 271-277). However, Shihata ruled out that the Bank's Articles of Agreement, which define its mandate and scope of intervention, authorise the World Bank to work on human rights, especially political and civil rights, because those rights properly fall within the political sphere, the regulation of which is to be left to the recipient states (Santos: 272. See also F. Upham, 'Mythmaking in the rule-of-law orthodoxy', in: Carothers, *Promoting the rule of law abroad*, 2006, Washington D.C., 75-104, at 77-8).

<sup>97</sup> Charter of the United Nations, San Francisco, 26 June 1945, 1 UNTS xvi, Arts 1 and 2.

<sup>98</sup> UN Charter, *supra* note 9797, Arts 1(2) and 55(c). The rule of law may also be connected to international peace and security.

<sup>99</sup> GA Res. 217 A (III) of 10 December 1948, preambular para. 3.

## **8. Conclusions**

In the following, the principal conclusions which have been drawn from the survey of literature that was done for this report, are summarized.

- The rule of law is promoted on a worldwide scale, but both practitioners and scholars have different understandings of what the rule of law means.
- This Inventory Report suggests that there is value in starting the conceptualisation from a thinner conception of the rule of law. A thinner conception is the lowest common denominator of all conceptions of the rule of law. The thinner conceptions are relatively uncontroversial since they can be accepted by actors that may disagree over issues regarding the exact content and meaning of democracy or human rights.
- The suggestion that a thin conception would be useful is not in any way motivated by doubts regarding the desirability of democracy and human rights. On the contrary, this Inventory Report, like many, if not all organisations involved in rule of law promotion, fully endorses the importance of promoting human rights observance and democracy. It also believes that democracy and human rights cannot function without the rule of law, thinly conceived, and that the rule of law may thus be regarded as the foundation of these other aims.
- The thin conception, however, has its own value (certainty and predictability, formal equality, the prevention of hindering of the arbitrary use of power). Thus, the rule of law may be of value to people that live under a government that does not (fully) meet all the requirements of democracy and human rights. Moreover, the rule of law is worth promoting, even if the further aims which it is supposed to serve, especially economic development may not (always) in fact be served by it.
- If one takes the thinner conception as a base-line of analysis, then more research is needed into the question how the thinner conceptions relate to wider fundamental values such as the right to participate in government ('democracy') and human rights standards as enshrined in international instruments. Is it feasible to promote the elements of the thin conception on the one hand and human rights and democracy on the other hand simultaneously, or do the elements of the thin conception need to be built before efforts are carried out to strengthen democracy and human rights? Are there examples of rule of law promotion efforts which have been (modestly) successful in creating or strengthening the rule of law (as thinly conceived) but have left serious deficits in democracy and human rights protection unaddressed or have even contributed to authoritarianism, and if so, what can be done to prevent this from happening again? How does the thinner conception promote wider participation in the government processes and does wider participation enhance the rule of law? How does the thinner conception promote adherence to basic human rights standards and how and to which extent do these standards at the international level enhance strengthen the rule of law? In other words, how can one have a meaningful programme in place modestly aimed at strengthening elements of the thinner definition without losing sight of more substantive values such as democracy and human rights? These are questions into which it would appear that more research is needed. It would however, seem a more focussed area of examination than attempts to unravel the various components of a thick rule of law conception.
- In line with this there seems to be little conceptualisation, either in academia or practice, of the relation between (a) the ends and requirements of the rule of law, (b) the political, cultural and economic conditions which have to be met for the rule of law to work, and (c) the means or instruments which are available to promote the rule of law. Rule of law promotion is often criticised for focussing on the relation between (a) and (c) (for instance: training judges in order to create or strengthen an independent judiciary), and for not even having a clear understanding of that relation.
- Academic writing on rule of law promotion is dispersed. There is no natural forum to exchange ideas and insights among academics, and academia and practice seem to be entirely disconnected. A single forum for academics and practitioners involved in rule of law promotion is much needed. HiiL has therefore taken the initiative to launch the

Hague Journal on the Rule of Law, a new cross-disciplinary journal devoted to academic and practitioner analysis of rule of law promotion, which will start to appear in autumn 2008.

- Many academics (and practitioners) stress the need to adopt an ends-based approach, rather than an institution-based approach, because rule of law promotion is likely to be more effective if it is built on what is locally available, and because what is locally available may not be what Westerners are used to. Little, however, seems to be known about how and to what extent rule of law-values can be served by mechanisms which are unfamiliar in the West: what do non-Western rule of law systems look like? More generally, is a demand-driven approach to rule of law promotion feasible?
- There is little research on: how non-state actors (academia, NGOs, media, and the population at large) contribute to strengthening the rule of law; whether and how in different contexts the rule of law has to be promoted differently (post-conflict societies, long-term development, post-communist); how international legal instruments can contribute to or constrain the development of the rule of law on a national level; means of rule of law promotion more generally; cross-country and cross-organisation assessments of rule of law promotion efforts; the extent to which rule of law promotion could be organised as a demand-driven activity rather than a top-down supply-driven activity (which focuses heavily on institutions).
- There is a considerable amount of research on: conceptions of the rule of law (although no consensus has emerged); the causal link between the rule of law and economic development (although no consensus has emerged); weaknesses of rule of law promotion (lack of shared definition, coordination, assessment; excessive focus on institutions, quantifiable deliverables, short-term reforms; lack of understanding of sequencing, prioritisation).

## 9. Annex I: An Elementary Rule of Law Model by A.W. Bedner

| Part 1: Procedural elements                                                                                                                | Related Research Questions (Legal [L] & Empirical [E])                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
|--------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| law (= written acts, regulations and decrees) as instrument of government action (rule by law)                                             | <ul style="list-style-type: none"> <li>to what extent does the government operate without using law? E</li> <li>to what extent does the government use incidental measures instead of general rules? L&amp;E</li> <li>to what extent does the government regulate the relations between its subjects by law? L&amp;E</li> <li>to what extent are these laws followed? E</li> </ul>                                                                                                                           |
| state actions are subject to law                                                                                                           | <ul style="list-style-type: none"> <li>to what extent does the law leave room for so-called '<i>vrij bestuur</i>', 'discretionary powers'? L</li> <li>are there exception clauses, allowing for special measures? L</li> <li>does the government in effect base its actions on law (i.e. does the government operate outside the law)? E</li> </ul>                                                                                                                                                          |
| law must be clear and certain in its content, accessible and predictable for the subject, and general in its application (formal legality) | <ul style="list-style-type: none"> <li>are laws juridically clear? L</li> <li>are there retroactive laws? L</li> <li>are there any exceptions in legislation? L</li> <li>are laws stable (not changed all the time)? L</li> <li>are laws applied generally (without discrimination)? E</li> <li>are laws accessible: <ul style="list-style-type: none"> <li>a) are laws published? E</li> <li>b) are laws written in comprehensible language? L&amp;E</li> </ul> </li> <li>are laws socialised? E</li> </ul> |
| consent determines or influences the content of the law and legal actions (democracy)                                                      | <ul style="list-style-type: none"> <li>are there any mechanisms for stakeholder participation in making regulations? L</li> <li>are there any mechanisms for stakeholder participation in making individual decrees? L</li> <li>are these mechanisms accessible? E</li> <li>are they effective? E</li> </ul>                                                                                                                                                                                                 |
| Part 2: Substantive elements                                                                                                               | Related Research Questions (L&E)                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |

|                                                                                                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                      |
|-----------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| subordination of all law and its interpretations to fundamental principles of justice, moral principles, fairness and due process | <ul style="list-style-type: none"> <li>• what are the applicable written principles of justice and of proper administration? L</li> <li>• what are the applicable unwritten principles of justice and of proper administration and moral principles? L</li> <li>• to what extent are these conflicting? L</li> <li>• to what extent are law and its interpretations effectively subordinated to these principles? L&amp;E</li> </ul> |
| protection of individual rights and liberties (fundamental political and property rights [1st generation])                        | <ul style="list-style-type: none"> <li>• to what extent are these legally guaranteed (including the question to what extent they apply in the relations between citizens)? L</li> <li>• to what extent are these legal guarantees implemented? E</li> </ul>                                                                                                                                                                          |
| the state exists for the benefit of each and every individual (social human rights / social welfare [2nd generation])             | <ul style="list-style-type: none"> <li>• to what extent are these legally guaranteed? L</li> <li>• to what extent are these legal guarantees implemented? E</li> </ul>                                                                                                                                                                                                                                                               |
| protection of group rights (3rd generation)                                                                                       | <ul style="list-style-type: none"> <li>• to what extent are these legally guaranteed? L</li> <li>• to what extent are these legal guarantees implemented? E</li> </ul>                                                                                                                                                                                                                                                               |

| Part 3: Controlling Mechanisms – Internal Control & Guardian Institutions                                                                                                                                          | Research Questions (Legal & Empirical)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| there exist internal checks and procedures within the administration to prevent unlawful government behaviour                                                                                                      | <ul style="list-style-type: none"> <li>• What internal checks and procedures within the administration are in place? L</li> <li>• Are they implemented and are they effective in preventing unlawful government behaviour? E</li> </ul>                                                                                                                                                                                                                                                                                                                                                          |
| there exists an independent judiciary charged with the interpretation and application of the law to which every aggrieved person has access (independence of the judiciary, sometimes broadened to trias politica) | <ul style="list-style-type: none"> <li>• Is there an independent judiciary (i.e. tenure security, issues of court management, etc.)? L&amp;E</li> <li>• Is the judiciary impartial (i.e. are there sufficient guarantees for 'insulation' from outside pressure in a given case)? L &amp; E</li> <li>• Do citizens have effective access to the judiciary (in terms of standing, distance from the court, costs, knowledge, legal aid, etc.)? L&amp;E</li> <li>• Does the judiciary dispose of adequate jurisdictional and remedial powers? L</li> <li>• Are judgments implemented? E</li> </ul> |
| there are other institutions (Ombudsman, Human Rights Commission, Tribunals, etc.) charged with safeguarding elements of the rule of law                                                                           | <ol style="list-style-type: none"> <li>1) Are there such institutions and what is their legal mandate? L</li> <li>2) How do they perform their functions and are they effective? E</li> </ol>                                                                                                                                                                                                                                                                                                                                                                                                    |

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